No. 17-8151

IN THE

Supreme Court of the United States

RUSSELL BUCKLEW,

Petitioner,

—v.—

ANNE PRECYTHE, *et al.*,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF MISSOURI IN SUPPORT OF PETITIONER

David D. Cole
Amanda W. Shanor
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005

Anthony E. Rothert
Gillian Wilcox
Jessie Steffan
ACLU OF MISSOURI FOUNDATION
906 Olive Street, Suite 1130
St. Louis, MO 63101

Sandra L. Babcock
CORNELL LAW SCHOOL
157 Hughes Hall
Ithaca, NY 14853-4901

Cassandra Stubbs
Counsel of Record
Anna Arceneaux
Olivia Ensign
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
201 W. Main Street, Suite 402
Durham, NC 27701
(919) 682-5659
cstubbs@aclu.org

Steven M. Watt
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. SUBJECTING MR. BUCKLEW TO PROLONGED SUFFOCATION IN HIS OWN BLOOD IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT. 5

A. The Assessment of Whether a Given Practice is Torture or Cruel, Inhuman, or Degrading Under International Law Considers an Individual's Specific Characteristics 8

B. International Law Deems Forms of Treatment Short of Four-Minute Asphyxiation in One's Own Blood as Torture or Cruel, Inhuman, or Degrading 11

II. BECAUSE LETHAL INJECTION IS CRUEL AND UNUSUAL AS APPLIED TO MR. BUCKLEW, THE STATE BEARS THE BURDEN OF IDENTIFYING AN ALTERNATIVE LAWFUL METHOD IF IT SEEKS TO EXECUTE HIM 16

A. *Glossip* Places the Burden on the Offender Where a Facial Challenge Would Have the Effect of Invalidating the Death Penalty Across the Board, But that Logic Does Not

Extend to an As-Applied Challenge that Affects Only a Single Person. 16

B. International Law Supports Placing the Burden on the State Because the State Has an Affirmative Duty to Prevent Torture or Cruel, Inhuman, or Degrading Treatment or Punishment. 18

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Atkins v. Virginia, 536 U.S. (2002) 17

Baze v. Rees, 553 U.S. 35 (2008)..... 6, 16

Cronin v. Islamic Republic of Iran,
238 F. Supp. 2d 222 (D.D.C. 2002)..... 10

Estelle v. Gamble, 429 U.S. 97 (1976) 6, 17

Glossip v. Gross, 135 S. Ct. 2726 (2015) 4, 16, 18

Graham v. Florida, 560 U.S. 48 (2010)..... 7

Gregg v. Georgia, 428 U.S. 153 (1976) 6, 17

In re Kemmler, 136 U.S. 436 (1890)..... 6, 15

Roper v. Simmons, 543 U.S. 551 (2005)..... 7, 15, 17

State v. Feilen, 126 P. 75 (Wash. 1912)..... 6

State v. Mata, 275 Neb. 1 (2008) 20

State v. Woodward, 68 S.E. 385 (W. Va. 1910)..... 6

Trajano v. Marcos-Manotoc,
978 F.2d 493 (9th Cir. 1992) 10

Trop v. Dulles, 356 U.S. 86 (1958)..... 7

United States v. Lee, 744 F.2d 1124 (5th Cir. 1984) 13

Whitten v. State, 47 Ga. 297 (1872)..... 6

U.S. CONSTITUTION

U.S. Const. amend. IIX.....*passim*

INTERNATIONAL AUTHORITIES

Abu Zubaydah v Lithuania, no. 46454/11, [GC],,
E.C.H.R. 2018-I..... 19

Al-Saadoon v. United Kingdom, no. 61498/08, E.C.H.R. 2010-IV 9

Aydin v Turkey, no. 57/1996/676/866, E.C.H.R. 2001-I (1997) 10

Case of the "Street Children" v. Guatemala, Judgment of Nov. 19, 1999, Inter-Am. Ct. H.R., (1999) 10

Cicek v. Turkey, no. 25704/94, E.C.H.R. 2001 9

Commission Nationale des Droits de l'Homme et des Libertés v. Chad, Comm. 74/92, Merits, 9th Annual Activity Report 1995-1996/96, 4 IHRR 94 1997 8

Cox v. Canada, Comm. No. 539/1993, U.N. Doc. CCPR/C/52/D/539/19930 (1994) 8

Deena v. Union of India, (1983), 4 SCC 645 (India) 19

Ditschwanelo v. Botswana, no. 277/2003, Merits, Afr. Comm. H.P.R. (2003) 10

Inter-American Commission on Human Rights, Report No. 28/18, Case No. 12,958, Report on Merits, Russell Bucklew, United States (March 18, 2018), *reproduced in* Amicus Br. of ACLU in Support of Petitioner App., *Bucklew v. Precythe*, No. 17-8151 (Apr. 6, 2018) 2, 11, 19, 20

Iorgov v. Bulgaria, no. 40653/98, E.C.H.R. 2004-I 9, 12

Ireland v. United Kingdom, no. 5310/71, E.C.H.R. (1978) 12

Kindler v. Canada, Comm. No. 470/1991, U.N. Doc. CCPR/C/48/D/470/ 1991 (1993) 9

Prosecutor v Delic, IT-04-83-T Trial Judgment, (15 Sept. 2008) 9

Selmouni v. France, no. 25803/94, E.C.H.R. 1999 9

Soering v. United Kingdom, no. 14038/88, Judgement, E.C.H.R. 1989 12

Velásquez Rodríguez v. Honduras, Merits. Inter-Am. Ct. H.R. (ser. C) No. 4, July 29, 1988 19

Vuolanne v. Finland, Comm. No. 265/19867 U.N.Doc. Supp. No. 40 (A/44/40) (1989) 9

African Charter on Human and Peoples' Rights Nov. 2015, 21 I.L.M. 58 (1982) 8, 11

American Declaration on the Rights and Duties of Man,OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948) 11

American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 123 ..... 8, 11

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 ..... 11, 19

Convention Against Torture, Addendum 5, Oct. 21, 1994, CAT/C/28/Add.5 12

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, E.T.S. No. 126 12

European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5; 213 U.N.T.S. 221 ... 8, 12

International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 ..... 8, 11, 19

International Covenant on Civil and Political Rights, June 8, 1992, 138 Cong. Rec. S4781-01 12

Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res 217A (III), U.N. Doc. A/810 (1948) 11

OTHER AUTHORITIES

Committee Against Torture, Concluding Observations on the United States, CAT/C/USA/CO/3-5, 19 January, 2014..... 19

Committee Against Torture, General Comment No. 2, Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007) 19

Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 Colum. J. Transnat'l L. 468 (2007)..... 13

General Comment No. 3 on the African Charter on Human and Peoples' Rights: the Right to Life, art. 4 (2015)..... 8

Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), U.N. Doc. HRI/GEN/1/Rev.1 (1994)..... 8

Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004)..... 19

M. Cherif Bassiouni, *Human Rights in Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235 (1983)..... 12

Metin Basoglu, *Waterboarding is severe torture: Research findings* (Dec. 25, 2012), https://metinbasoglu.wordpress.com/2012/12/25/waterboarding-is-severe-torture-research-findings/ 14

Restatement (Third) of the Foreign Relations Law of the United States (1987) 12

Transcripts of the Proceedings and Judgment of the International Military Tribunal for the Far East, *reproduced in* The Tokyo War Crimes Trial (R. John Pritchard & Sonia Magbanna Zaide eds., 1981) 13

U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices, Sri Lanka, 2014 Report (Jun. 25, 2015) 14

U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices, Tunisia, 2010 Report (Apr. 8, 2011) 14

U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices, Sri Lanka, 2011 Report 14

INTERESTS OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization of approximately 1.75 million members dedicated to the principles of liberty and equality embedded in the United States Constitution. In the nearly 100 years since its founding, the ACLU has appeared in myriad cases before this Court, both as merits counsel and as an *amicus curiae*, to defend constitutional rights, including numerous cases involving the criminal justice system and capital punishment, such as *Mapp v. Ohio*, 367 U.S. 643 (1961); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Terry v. Ohio*, 392 U.S. 1 (1968); *Furman v. Georgia*, 408 U.S. 238 (1972); *Chicago v. Morales*, 527 U.S. 41 (1999); *Atkins v. Virginia*, 536 U.S. (2002); and *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

The ACLU represents Petitioner Russell Bucklew before the Inter-American Commission on Human Rights (IACHR). The Commission has ruled that, in light of Mr. Bucklew's unique medical condition and the excruciating pain he would suffer if executed by lethal injection, doing so would violate the prohibition on cruel and inhuman punishment and amount to torture. Inter-American Commission on Human Rights, Report No. 28/18, Case No. 12,958, Report on Merits, Russell Bucklew, United

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief. The parties have provided blanket consent to the filing of amicus briefs in this case, and copies of the letters of consent are on file with the Clerk's Office.

States (March 18, 2018) (IACHR Report), *reproduced in* Amicus Br. of ACLU in Support of Petitioner App., *Bucklew v. Precythe*, No. 17-8151 (Apr. 6, 2018) (ACLU Cert. Amicus App.).

The ACLU of Missouri is one of the ACLU's statewide affiliates and has more than 19,000 members. The ACLU of Missouri has provided direct representation and acted as an *amicus curiae* in numerous state and federal cases challenging the administration of the death penalty.

SUMMARY OF ARGUMENT

I. If Missouri is allowed to execute Russell Bucklew by lethal injection, he will choke on his own blood and suffocate for four minutes before dying. This does not happen with other lethal injection executions. But Mr. Bucklew suffers from cavernous hemangioma, a rare medical condition that will lead to these results and make the lethal injection procedures particularly excruciating in his case. To subject Mr. Bucklew to such severe pain and suffering, far beyond that involved in lethal injection generally, would be cruel and unusual punishment. Just as a state could not subject a criminal defendant to waterboarding, a form of temporary suffocation, as punishment for a crime, so Missouri cannot constitutionally subject Mr. Bucklew to the prolonged suffocation that lethal injection would create in his particular circumstance.

This conclusion is reinforced by the fact that subjecting anyone to such prolonged and intense pain and suffering is contrary to global standards of decency, reflected in international and national law the world over. The Court's Eighth Amendment

jurisprudence looks to such international law not because it is binding, but to inform its judgment about the standards of decency that the Eighth Amendment protects. Here, international law makes clear that a state cannot lawfully subject a criminal defendant—or anyone else—to suffocation in his own blood.

While international law does not prohibit capital punishment per se, nor all forms of lethal injection, it does prohibit any execution method that would constitute torture or cruel, inhuman, or degrading treatment. And in assessing whether a given practice amounts to torture or cruel, inhuman, or degrading treatment, international law takes into account the particular characteristics of the individual affected. It therefore requires considering the effects of Mr. Bucklew's cavernous hemangioma on the suffering he will endure. While others executed by lethal injection will not suffocate in their own blood, Mr. Bucklew will.

Asphyxiation in one's own blood for four minutes until one dies certainly qualifies as torture or cruel, inhuman, or degrading treatment or punishment, and, as such, is absolutely prohibited by international law. If subjecting Mr. Bucklew to the substantially less severe practice of waterboarding would violate these international norms, then *a fortiori*, subjecting him to prolonged suffocation in his own blood until he dies does as well.

II. In as-applied challenges to a method of execution, neither the Eighth Amendment nor international law supports placing the burden of identifying a non-cruel method of punishment on the defendant rather than the state. While this Court

has held that a *facial* challenge to a method of execution requires a showing that a less painful execution alternative exists, that burden is inappropriate where, as here, an individual mounts only an *as-applied* challenge. The Court in *Glossip v. Gross*, 135 S. Ct. 2726 (2015), reasoned that because a facial challenge to a method of execution would, absent an available alternative method, constitute a *de facto* invalidation of the death penalty itself, the defendant must show an available alternative. This as-applied challenge, however, does not implicate the *de facto* validity of the death penalty. To rule for Mr. Bucklew would leave unaffected lethal injection as to other condemned persons.

This Court's rulings that "deliberate indifference" to an inmate's medical needs violates the Eighth Amendment also supports imposing on the state the obligation to avoid a method of execution that, because of Mr. Bucklew's unique medical condition, will inflict prolonged and excruciating suffering, far beyond that generally associated with lethal injection. Thus, *Glossip*'s requirement for facial challenges should not be extended to this as-applied challenge.

International law also supports placing the burden of proving a non-cruel method of execution on the state rather than the defendant in an as-applied challenge. International law imposes an affirmative obligation on states to *prevent* torture or cruel, inhuman, or degrading treatment or punishment. The United States has ratified both the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights,

both of which impose an affirmative duty of prevention upon signatory states. Where, as here, a particular execution method as applied to a particular individual will foreseeably result in torture or cruel, inhuman, or degrading treatment or punishment, the state's duty to prevent such conduct means that it can proceed only if it identifies an alternative method that will *not* inflict torture or cruel, inhuman, or degrading treatment or punishment.

ARGUMENT

I. SUBJECTING MR. BUCKLEW TO PROLONGED SUFFOCATION IN HIS OWN BLOOD IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

If Missouri executes Mr. Bucklew by lethal injection, the results will be gruesome and excruciatingly painful. Mr. Bucklew's rare condition, cavernous hemangioma, has caused blood-filled tumors to grow in his head, neck, and throat—tumors that often block his airway and easily rupture and bleed. A medical expert who examined Mr. Bucklew concluded that if Missouri is permitted to execute him by lethal injection, he is "highly likely to experience . . . the excruciating pain of prolonged suffocation resulting from the complete obstruction of his airway." Pet. App. 109a ¶ III.E. Mr. Bucklew's throat tumor will likely rupture, and "[t]he resultant hemorrhaging will further impede his airway by filling his mouth and airway with blood, causing him to choke and cough on his own blood during the lethal injection process." *Id.* ¶ III.F.

Subjecting an individual to four minutes of suffocation in his own blood until he dies is indisputably cruel and unusual. A plurality of this Court noted in *Baze v. Rees*, 553 U.S. 35 (2008), that absent the initial drug in the lethal injection protocol, which renders an individual unconscious, the suffocation caused by the second two drugs would be unconstitutionally cruel and unusual. *Id.* at 53 ("It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride."). Because, in Mr. Bucklew's case, the process of administering the initial drug will cause prolonged suffocation *before* he loses consciousness, it is indisputably cruel and unusual.

As this Court stated more than a century ago, "Punishments are cruel when they involve torture or a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890). The Eighth Amendment prohibits the kinds of punishments that "disgraced the civilizations of former ages, and make one shudder with horror to read of them." *Whitten v. State*, 47 Ga. 297, 301 (1872); *State v. Feilen*, 126 P. 75, 76 (Wash. 1912) (quoting *Whitten*, 47 Ga. at 301); *State v. Woodward*, 68 S.E. 385, 388 (W. Va. 1910) (same); *see also Estelle v. Gamble*, 429 U.S. 97, 102 (1976) ("[T]he primary concern of the drafters [of the Eighth Amendment] was to proscribe 'torture(s)' and other 'barbar(ous)' methods of punishment." (quoting *Gregg v. Georgia*, 428 U.S. 153, 170 (1976)). That is precisely what is contemplated if Mr. Bucklew is subjected to lethal injection.

This conclusion is reinforced by reference to international law. For well over half a century, "the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (citing *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958) (plurality opinion), and collecting cases).

In *Roper*, for example, this Court held that the juvenile death penalty offends civilized standards of decency, in part because "the weight of authority against it . . . in the international community, has become well established." 543 U.S. at 578. "The opinion of the world community," the Court observed, "while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." *Id.; see also, e.g., Graham v. Florida*, 560 U.S. 48, 80 (2010) (examining the juvenile sentencing practices of other countries in accordance with the Court's "longstanding practice in noting the global consensus against the sentencing practice in question.").

Here, international law is informative in two respects: (a) it requires that assessing whether a given punishment is permitted or prohibited requires consideration of the individual's subjective characteristics; and (b) international law absolutely forbids torture and cruel, inhuman or degrading treatment or punishment, and those prohibitions bar the four-minute asphyxiation of Mr. Bucklew in his own blood at issue here.

A. The Assessment of Whether a Given Practice is Torture or Cruel, Inhuman, or Degrading Under International Law Considers an Individual's Specific Characteristics.

International law does not generally prohibit the death penalty following a fair trial. *See e.g.*, International Convention on Civil and Political Rights, art. 6 (2), Dec. 16, 1966, 999 U.N.T.S. 171 (ICCPR) (recognizing that states may impose the death penalty under certain limited circumstances); *see also* African Charter on Human and Peoples' Rights art. 4, 24-26, Nov. 2015, 21 I.L.M. 58 (1982) (ACHPR); General Comment No. 3 on the ACHPR: the Right to Life, art. 4 at ¶¶ 24-26 (2015); American Convention on Human Rights, art. 4(2), Nov. 21, 1969, 1144 U.N.T.S. 123 (ACHR); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2(1), Nov. 4, 1950, E.T.S. No. 5; 213 U.N.T.S. 221. But it does require that executions be carried out "in such a way as to cause the least possible physical and mental suffering." Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), ¶ 6 U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994). And international law prohibits states from using methods that constitute torture or cruel, inhuman, or degrading treatment or punishment.

Human rights bodies have upheld the lawfulness of lethal injection under this framework. *Cox v. Canada*, Comm. No. 539/1993, U.N. Doc. CCPR/C/52/D/539/19930 (1994); *Kindler v. Canada*, Comm. No. 470/1991, U.N. Doc. CCPR/C/48/D/470/

1991 (1993) (lethal injection found not to violate ICCPR, art. 7 (prohibition on torture and other cruel, inhuman, or degrading treatment or punishment). But where a method of execution as applied to a specific individual would inflict pain and suffering sufficiently severe to constitute torture or cruel, inhuman, or degrading treatment or punishment, it is absolutely prohibited.

To constitute cruel, inhuman, or degrading treatment or punishment, suffering must go beyond "that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment." *Iorgov v. Bulgaria*, no. 40653/98, ¶71, E.C.H.R. 2004-I. This assessment necessarily looks to the effect of the treatment, *taking into account the individual's particular characteristics.* Whether conduct amounts to torture, for example, "depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects, and, in some cases, the *sex, age, and state of health of the victim*, etc." *Selmouni v. France*, no. 25803/94, ¶100, E.C.H.R. 1999 (emphasis added); *see also Vuolanne v. Finland*, Comm. No. 265/19867 U.N.Doc. Supp. No. 40 (A/44/40) at 249, 256 (1989); *Al-Saadoon v. United Kingdom*, no. 61498/08, ¶121, E.C.H.R. 2010-IV; *Prosecutor v Delic*, IT-04-83-T Trial Judgment, 50-a (15 Sept. 2008).

So, too, "[t]he assessment of th[e] minimum" required under the cruel, inhuman, or degrading punishment standard "is relative and depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects." *Cicek v. Turkey*, no. 25704/94, ¶ 172, E.C.H.R. 2001.

Courts regularly consider the health and age of an individual in evaluating whether treatment constitutes torture or cruel, inhuman, or degrading treatment or punishment. *See, e.g.*, *Cronin v. Islamic Republic of Iran*, 238 F. Supp. 2d 222, 226-28 (D.D.C. 2002) (discussing plaintiff's pre-existing medical condition in assessing whether his alleged pain and suffering was sufficiently severe to hold Iran responsible for plaintiff's torture under 28 U.S.C. § 1605A(a)(1)); *Trajano v. Marcos-Manotoc*, 978 F.2d 493 (9th Cir. 1992) (determining whether plaintiff's pain and suffering was sufficiently severe to constitute torture based on numerous factors including the alleged victim's age); *Aydin v Turkey*, no. 57/1996/676/866, E.C.H.R. 2001-I (1997) (considering individual's age in assessing whether police interrogation methods amounted to torture); *Case of the "Street Children" v. Guatemala*, Judgment of Nov. 19, 1999, Inter-Am. Ct. H.R. ¶ 152 (1999) (noting individual's "tender age" in assessing whether alleged conduct constituted torture).

For this reason, the African Commission on Human and Peoples' Rights has held that while execution by hanging may *generally* be consistent with international law, it may "not be compatible with the respect for the inherent dignity of the individual" as applied in some instances, such as when it is "carried out without appropriate attention to the weight of the person condemned" and thus could result in "either slow or painful strangulation, because the neck is not immediately broken by the drop, or at the other extreme, in the separation of the head from the body." *Ditschwanelo v. Botswana*, no. 277/2003, Merits, ¶169, Afr. Comm. H.P.R. (2003).

The gruesome chain of events contemplated in Mr. Bucklew's case are not the consequence of Missouri's protocol *in general*, but of its particular application to Mr. Bucklew, whose rare medical condition renders his prolonged suffocation in his own blood all but certain, and far in excess of the pain and suffering that generally accompanies lethal injection. As the Inter-American Commission concluded, for the state to execute Mr. Bucklew in such a fashion would constitute torture or cruel and inhuman punishment in violation of international law. IACHR Report ¶ 98 (ACLU Cert. Amicus App. 53a).

B. International Law Deems Forms of Treatment Short of Four-Minute Asphyxiation in One's Own Blood as Torture or Cruel, Inhuman, or Degrading.

International, regional, and national laws around the world categorically prohibit torture and other cruel, inhuman, or degrading treatment or punishment.[2] Those prohibitions are so universally

---

[2] All of the major international and regional human rights treaties and other international instruments prohibit torture and other cruel, inhuman, or degrading treatment or punishment. *See, e.g.*, Universal Declaration of Human Rights, Dec. 10, 1948, art. 5, G.A. Res 217A (III), U.N. Doc. A/810 (1948) ("No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."); ICCPR, art. 7; CAT, arts. 2, 16; ACHPR, art. 5; American Declaration on the Rights and Duties of Man, May. 2, 1948, art. XXV, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948); ACHR, art. 5; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221; *see also* European Convention for the Prevention of Torture and

recognized that they now form part of customary international law. *Restatement (Third) of the Foreign Relations Law of the United States* §§ 331 cmt. e; 702(d) cmt. n (1987).

As noted above, those laws prohibit punishment that inflicts pain or suffering beyond "that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment." *Soering v. United Kingdom*, no. 14038/88, Judgement, ¶ 100, E.C.H.R. 1989; *see also Iorgov*, no. 40653/98 at ¶ 71; *Ireland v. United Kingdom*, no. 5310/71, E.C.H.R. (1978) (noting that the prohibition on torture was meant to "attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering").

Missouri's proposed method of executing Mr. Bucklew would violate these international prohibitions, which have recognized other forms of treatment short of four-minute asphyxiation in one's own blood resulting in death as torture or cruel, inhuman, or degrading treatment or punishment.

For example, waterboarding—which produces the sensation of suffocation for a far shorter length of

---

Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, E.T.S. No. 126.

The United States has ratified the CAT and the ICCPR. *See* Addendum 5, Oct. 21, 1994, CAT/C/28/Add.5; ICCPR, June 8, 1992, 138 Cong. Rec. S4781-01. In addition, more than eighty national constitutions prohibit torture, and other forms of cruel, inhuman, or degrading treatment or punishment. M. Cherif Bassiouni, *Human Rights in Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235, 263-64 & n.128 (1983).

time than Mr. Bucklew is expected to suffer—constitutes torture under international law. The International Military Tribunal for the Far East (IMTFE), convened by the Allied nations, including the United States, following World War II, concluded that Japanese forces committed torture when they subjected prisoners-of-war and civilian internees to waterboarding. Transcripts of the Proceedings and Judgment of the International Military Tribunal for the Far East at 48,413 (Nov. 4, 1948) (IMTFE Record), *reproduced in* The Tokyo War Crimes Trial (R. John Pritchard & Sonia Magbanna Zaide eds., 1981); *see also* Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 Colum. J. Transnat'l L. 468 (2007) (collecting decisions of domestic and international courts finding waterboarding and other forms of water torture illegal). "Among these tortures [used by Japanese forces was] the water treatment," IMTFE Record at 49,663, in which an individual was tied or held down on his back, a cloth placed over his nose and mouth, and water poured over the cloth to create the sensation of drowning or held under water until almost drowned, IMTFE Record at 12,940, 14,168, 49,663-64. *Cf. United States v. Lee*, 744 F.2d 1124 (5th Cir. 1984) (affirming federal conviction for civil rights violations in case of sheriff and several deputies who used "water torture" against suspects during interrogation).

In its annual reports on other countries' human rights practices, the State Department has repeatedly classified "near-drowning," "asphyxiation in water," and "submersion of the head in water" as forms of torture and condemned those practices. *See, e.g.*, U.S. Dep't of State, Bureau of Democracy,

Human Rights, and Labor, Country Reports on Human Rights Practices, Sri Lanka 2014 Report (Jun. 25, 2015), http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dlid=252975; U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices, Sri Lanka 2011 Report, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dlid=186475; U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices, Tunisia 2010 Report (Apr. 8, 2011), https://www.state.gov/j/drl/rls/hrrpt/2010/nea/154474.htm.

The severe psychological suffering caused by asphyxiation has also been demonstrated in the social scientific literature. *See* Metin Basoglu, *Waterboarding is severe torture: Research findings* (Dec. 25, 2012), https://metinbasoglu.wordpress.com/2012/12/25/waterboarding-is-severe-torture-research-findings/ (surveying research of a leading scholar on torture and cruel, inhuman, and degrading treatment and punishment, including the results of a study finding that, as among 45 different forms of torture, treatment involving suffocation or asphyxiation was the strongest predictor of post-traumatic stress disorder (PTSD)).

Applying these principles to Missouri's plan to execute Mr. Bucklew by lethal injection, the Inter-American Commission found that doing so would inflict cruel and inhuman punishment and could result in torture:

> The Commission considers that this particular risk of choking on his own blood, being aware of it, and for a period

> of up to four minutes, taking in consideration the context of extreme stress and anxiety, would constitute cruel and inhuman punishment. The IACHR finds that the severity of the suffering that would be imposed under such circumstances could amount to torture.

IACHR Report ¶ 78 (ACLU Cert. Amicus App. 42a). The Commission ruled that allowing Missouri to proceed with the execution of Mr. Bucklew in such a fashion would violate the United States' international obligations to ensure it does not inflict cruel and inhuman punishment. *Id.* at ¶ 83 (ACLU Cert. Amicus App. 45a).

In short, international law further confirms that executing Mr. Bucklew in this manner would "offend civilized standards of decency," *Roper*, 543 U.S. at 578, and would constitute either torture or cruel, inhuman, and degrading punishment. This supports the conclusion, independently compelled by Eighth Amendment jurisprudence itself, that Mr. Bucklew's execution would be cruel and unusual. As this Court reasoned more than a century ago, "[p]unishments are cruel when they involve torture or a lingering death . . . something more than the mere extinguishment of life." *In re Kemmler*, 136 U.S. at 447.

II. BECAUSE LETHAL INJECTION IS CRUEL AND UNUSUAL AS APPLIED TO MR. BUCKLEW, THE STATE BEARS THE BURDEN OF IDENTIFYING AN ALTERNATIVE LAWFUL METHOD IF IT SEEKS TO EXECUTE HIM.

A. *Glossip* Places the Burden on the Offender Where a Facial Challenge Would Have the Effect of Invalidating the Death Penalty Across the Board, But that Logic Does Not Extend to an As-Applied Challenge that Affects Only a Single Person.

In *Glossip*, this Court placed the burden on an inmate raising a *facial* challenge to his method of execution to specify an alternative method "that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 52). It did so precisely because *Glossip* involved a *facial* challenge. The Court reasoned that "because it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out." 135 S. Ct. at 2732-33 (quoting *Baze*, 553 U.S. at 47); for this reason, the Court held that an inmate who facially challenges a method of execution must identify a feasible and readily implemented alternative method. *Id.* at 2737. That reasoning is inapplicable here.

Glossip placed the burden on the inmate so as not to permit facial challenges to methods of execution from *de facto* rendering the death penalty

unconstitutional across the board. That logic has no bearing, however, on Mr. Bucklew's individualized as-applied challenge. Should this Court conclude that executing Mr. Bucklew by lethal injection will cause a substantial risk of severe suffering because of his rare medical condition, lethal injection will otherwise continue to be available as a method of execution in Missouri.

This Court has in fact long recognized that while the death penalty is generally constitutional, *see Gregg*, 428 U.S. 153, it is not constitutional as applied to every individual. In *Atkins*, 536 U.S. 304, for example, the Court concluded that the execution of persons with intellectual disability would offend the standards of decency required by the Eighth Amendment. And in *Roper*, 543 U.S. 551, it held unconstitutional the death penalty as applied to juvenile offenders. Those holdings did not undermine the constitutionality of the death penalty in other contexts, as applied to other individuals who do not share the specific characteristics that rendered their executions cruel and unusual.

Moreover, this Court's longstanding rule that "deliberate indifference" to an inmate's specific medical condition can rise to the level of cruel and unusual punishment, *Estelle*, 429 U.S. at 104, further supports placing the burden on the state in as-applied cases. If Mr. Bucklew's medical condition required treatment and the state were deliberately indifferent to that fact, its actions would violate the Eighth Amendment. So, too, where it seeks to carry out a method of execution that it knows will inflict severe and excruciating pain because of his medical condition, the Eighth Amendment imposes on the

state an affirmative obligation to respond—here, by not using that method, and only proceeding with the execution if it can identify a method that would not inflict cruel and unusual punishment.

In short, the state's affirmative Eighth Amendment obligation to attend to the specific medical needs of its inmates supports the conclusion that, if Missouri seeks to execute Mr. Bucklew, it must identify a non-cruel way to do so. And because this challenge does not call into question lethal injection generally, nothing in *Glossip* or this Court's death penalty jurisprudence suggests that the burden of identifying an alternative method of execution should be placed on the inmate when the state's chosen method would constitute cruel and unusual punishment only as applied to him.

B. International Law Supports Placing the Burden on the State Because the State Has an Affirmative Duty to Prevent Torture or Cruel, Inhuman, or Degrading Treatment or Punishment.

International law also supports placing the burden of identifying a non-cruel method of execution on the state if it seeks to go forward with Mr. Bucklew's execution. The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, and other international treaties that prohibit torture and cruel, inhuman, or degrading treatment or punishment all impose affirmative obligations on states to prevent

such conduct.[3] States are required "to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment." *Abu Zubaydah v Lithuania*, no. 46454/11, [GC] ¶632, E.C.H.R. 2018-I (2018).

This affirmative duty to *prevent* torture and cruel, inhuman, or degrading punishment means that unless Missouri can identify a method of execution that would not foreseeably violate these prohibitions, it cannot proceed with Mr. Bucklew's execution. In other capital cases, international human rights bodies and national courts have recognized that the state must bear this burden. *See* Committee Against Torture, Concluding Observations on the United States, CAT/C/USA/CO/3-5 ¶25, 19 January, 2014 (recommending that the United States "review its execution methods in order to prevent pain and prolonged suffering"); *Deena v. Union of India*, (1983) 4 SCC 645, 688 ¶¶ 81-82 (India), *available at* https://www.aclu.org/legal-document/deena-v-union-india-decision (finding that under India's constitution a "heavy burden"

---

[3] *See* CAT arts. 2(1), 16; Committee Against Torture, General Comment No. 2, Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007); ICCPR, art. 2; Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004); footnote 2, *supra* (citing international and regional human rights treaties); *see also* Afr. Comm. H.P.R., *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, Comm. 74/92, Merits, 9th Annual Activity Report 1995-1996/96, 4 IHRR 94 1997; *Velásquez Rodríguez v. Honduras*, Merits. Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 174-75 July 29, 1988; IACHR Report ¶ 76 (ACLU Cert. Amicus App. 41a).

rests on the state to demonstrate that any method used "causes no greater pain than any other known method of executing the death sentence and it involves no barbarity, torture or degradation.").[4]

The Inter-American Commission's decision in Mr. Bucklew's case confirms this approach:

> The IACHR reiterates that, under peremptory norms of international human rights law and as reflected in the American Declaration, the United States has the duty to abstain from carrying out an execution when there is significant risk that it would breach the prohibition of cruel and inhuman treatment or torture. Compliance with this duty cannot be conditioned on the existence of "alternatives."

IACHR Report ¶ 80 (ACLU Cert. Amicus App. 43a).

Under both constitutional and international law, subjecting Mr. Bucklew to a method of execution that will result in prolonged suffocation in his own blood, inflicting pain far in excess of that inherent to lethal injection generally, is prohibited. If the state seeks to execute Mr. Bucklew, it bears the burden of identifying an alternative method that is not cruel and unusual.

---

[4] The Nebraska Supreme Court has also followed this same approach. *See State v. Mata*, 275 Neb. 1, 67-69 (2008) (holding that electrocution is unconstitutional under the state constitution because it will inflict "intense pain and agonizing suffering" and requiring the state to "allege and demonstrate that a constitutionally acceptable method" is available).

CONCLUSION

For the above reasons, this Court should hold that the Eighth Amendment prohibits Missouri from executing Mr. Bucklew by lethal injection.

Respectfully submitted,

Cassandra Stubbs
Counsel of Record
Anna Arceneaux
Olivia Ensign
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
201 W. Main Street,
Suite 402
Durham, NC 27701
(919) 682-5659
cstubbs@aclu.org

Steven M. Watt
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

David D. Cole
Amanda W. Shanor
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005

Anthony E. Rothert
Gillian Wilcox
Jessie Steffan
ACLU OF MISSOURI
FOUNDATION
906 Olive Street,
Suite 1130
St. Louis, MO 63101

Sandra L. Babcock
CORNELL LAW SCHOOL
157 Hughes Hall
Ithaca, NY 14853-4901

Date: July 20, 2018